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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM 1984

R. ANTHONY MARRESE, M.D., and BONE AND JOINT SURGEONS, INC.

Petitioner,

v.

INTEROUAL, INC., et al.,

Respondents.

AMICUS CURIAE BRIEF ON BEHALF OF THE UNDERSIGNED STATES IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF THE AMICI STATES

The undersigned States are responsible for the enforcement of state and federal antitrust laws and the health care regulatory statutes in this case. As such, the States are interested in an interpretation of those laws that is consistent with the clearly reconcilable legislative purposes of those laws. The decision of the court of appeals below threatens to confuse and undermine the relationship between the federal and state interests in a competitive market for the provision of health care services and the licensing of physicians and hospitals to promote high quality health care services.

SUMMARY OF ARGUMENT

The decision of the court of appeals below is wholly contrary to this Court's clear and repeated articulation and application of the so-called "state action" doctrine. Its insistence on interpreting as irreconcilable the harmonious state policies favoring both competition among health care and other professionals and licensing of those professionals to assure competence undermines the States' ability to carry out those policies.

The court of appeals decision directly conflicts with the opinion of the 4th Circuit in Ratino v. Medical Service of the District of Columbia, 718 F.2d 1260 (4th Cir. 1983), threatening to mislead lower courts and create unnecessary litigation to correct its gross error.

The court of appeals decision misstated and then misapplied the state action doctrine. Its finding of a "clear articulation" of state policy in the existence of a state peer review statute ignores the need to determine whether the statute reveals a legislative intent to "displace competition" with regulation of physician services. Further, its finding of "active state supervision" in the mere existence of state physician and hospital licensing laws fails to meet this Court's requirement that a state provide for a "pointed reexamination" of the private conduct being challenged. These errors make review by this Court crucial to avoid further confusion.

The court of appeals affirmance of the dismissal of plaintiff's antitrust suit on the pleadings on a ground not considered by the district court is

unprecedented in this Court's state action cases. To find state action immunity in a case such as this involving purely private conduct alleged to be in "bad faith" and therefore outside of any alleged state statutory duty requires at least a cursory factual examination. Absent such an examination, the lower courts cannot fairly determine the crucial questions of whether the alleged conduct falls within a "clearly articulated" and "affirmatively expressed" state policy to displace competition and whether the private conduct was "actively supervised" by the state. The court of appeals decision thus offers a broad protective umbrella for even the most blatant anticompetitive conduct that is ostensibly conducted pursuant to state peer review and licensing laws. This result is contrary

to this Court's decisions and the federal and state policies favoring competition generally and among health care providers in particular.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS IRRECONCILABLY WITH A DECISION OF ANOTHER COURT OF APPEALS REGARDING THE RELATIONSHIP BETWEEN THE ANTITRUST LAWS AND STATE REGULATION OF PHYSICIANS AND HOSPITALS

The court of appeals below held that the voluntary activities of private physicians and a private hospital were exempt from the federal antitrust laws because of the claimed existence of state laws that purportedly meet the requirements of this Court's "state action" doctrine. See, Parker v. Brown, 317 U.S. 341 (1943); Southern Motor Carriers Rate Conference, Inc. v. U.S., ____ U.S. ____ (March 27, 1985); Hoover v. Ronwin, _____ U.S. _____, 104 S.Ct. 1989 (1984). This decision is in direct conflict with that of the Court of Appeals for the Fourth Circuit in Ratino v. Medical Service of the District of

Columbia, 718 F.2d 1260 (4th Cir. 1983). The court of appeals decision below intolerably confuses the meaning and scope of the state action doctrine, and threatens to lead other federal and state courts[1] to provide an unjustified immunity for a wide range of private conduct in the health care industry.

In Ratino, the court of appeals rejected the contention that a Maryland statute creating a physician disciplinary commission provided the requisite clear articulation of a state policy to displace competition with actively state supervised regulation of the challenged conduct necessary to meet the test enunciated by the Parker case and its

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1 See, e.g., RCW 19.86.920 (1983) which directs Washington state courts to "be guided by final decisions of the federal courts . . . interpreting the various statutes dealing with the same or similar matters . . ."

progeny. 718 F.2d at 1268.[2] The court of appeals stated that Maryland's regulatory scheme which, inter alia, authorized a state board to discipline physicians for gross and willful overcharging did not evidence a state policy to displace price competition for physician services in Maryland.

In the instant case, the court of appeals affirmed the dismissal on the pleadings of an antitrust suit alleging a conspiracy among private physicians at a private hospital to boycott the plaintiff by revoking the plaintiff's privileges at the hospital. Stripped of its confused rhetoric, the court below held that the existence of two facts -- 1) the state requires private hospitals to establish peer review committees and 2) that state

2 At issue in Ratino was a physician reimbursement practice of a private third-party payor of health care services.

physician and hospital licensing boards may gain access to information adduced by such committees -- shielded the challenged conduct from antitrust scrutiny under the state action doctrine. Op. at 21-35.[3]

This conflict stems from the 7th Circuit's complete misreading of this Court's cases articulating the requirements of and rationale underlying the state action doctrine. This Court has repeatedly emphasized that private parties may only claim the cloak of state

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3 The statutory availability of peer review materials to physician licensing boards more likely evidences a state purpose to avoid claims of confidentiality rather than "supervision" of private conduct. See, e.g., Medical Peer Review Protection in the Health Care Industry, 52 Temple L.Q. 552 (1979) and cases discussed therein. As discussed further in Part III, infra, this ambiguity of state policy is another reason why summary dismissal is wholly inappropriate in this case.

action when the state, acting through its legislature or supreme court, has:

1) "clearly articulated" and "affirmatively expressed" a policy to "displace competition" with regulation, Southern Motor Carriers, supra, slip op. at 8, 13; and

2) provided for active state supervision of the private conduct, Southern Motor Carriers, supra.

The implications of the court of appeals decision are staggering. The opinion arguably immunizes any conduct by private physicians which can be claimed to be within a "peer review" context. The mere permissive authority for the consideration of peer review materials by a physician licensing board -- but not reexamination of a private hospital's privilege revocation decision -- cannot be read to provide a clear articulation

of an anticompetitive state policy or the requisite active supervision. Of course, every state requires both physicians and hospitals to be licensed under state law in a manner similar to the Indiana statute under consideration in this case. This unjustifiable expansion of state action immunity might prevent challenges to even the most blatant anticompetitive activities by purely private parties, so long as the conduct was supposedly performed within the context of a hospital governing structure. Such a result would be contrary to the clear rulings of the Court, that of the 4th Circuit in Ratino, congressional intent and the intent of state legislatures, and should not be allowed to stand.

II. THE COURT OF APPEALS INCORRECTLY CONSTRUED BOTH FEDERAL AND STATE LAW IN FINDING THAT PURELY VOLUNTARY AND ALLEGEDLY CONSPIRATORIAL CONDUCT OF PRIVATE PARTIES IS IMMUNE FROM ANTITRUST SCRUTINY BECAUSE OF THE SUPPOSED CONFLICT BETWEEN ANTITRUST LAW AND STATE STATUTES AUTHORIZING PEER REVIEW OF PHYSICIANS AND REQUIRING THE LICENSURE OF PHYSICIANS AND HOSPITALS.

A. State Action Immunity Requires Proof that the Challenged Conduct is Within a "Clearly Articulated" and "Affirmatively Expressed" State Policy to Displace Competition with Regulation

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This Court has repeatedly made clear that exemptions from the antitrust laws are disfavored and are not to be lightly implied and, if found, must be contrued as narrowly as possible. See, e.g., Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982) (peer review activities by private health care providers not exempt as "business of insurance" within the meaning of the McCarran-Ferguson Act); National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1981)

(voluntary "cost containment" by private parties not impliedly exempt due to provisions of the National Health Planning and Resources Development Act).

In applying this principle to claims of immunity because of supposed "state action," the Court has articulated a "two-pronged test" that must be met before a private party[4] can claim the shield of a state-granted immunity. First, the state must "clearly

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4 Although the Court said in Southern Motor Carriers that the "success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant," slip op. at 10, other recent decisions of the Court make clear that acts by the state itself or by municipalities are subject to less stringent tests. Hoover v. Ronwin, ____ U.S. ____, 104 S.Ct. 1989 (1984) (actions by state supreme court or state legislature exempt without further analysis); Town of Hallie v. City of Eau Claire, ____ U.S. ____, (March 27, 1985) (no active state supervision of conduct by municipalities required for state action immunity to attach).

articulate" and "affirmatively express" a policy to displace competition in a specific area of commerce with a scheme of regulation. Southern Motor Carriers Rate Conference, Inc. v. U.S., ____ U.S. ____ (March 27, 1985). As part of this requirement, it must be clear that the specific, private "anticompetitive conduct of the State's representative was contemplated by the State." Hoover v. Ronwin, ____ U.S. ____, 104 S.Ct. 1989, 1995 (1984). Second, the private conduct must be "actively supervised" by the state itself. California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980). This element flows from the principle that a state may not "give immunity to those who violate the Sherman Act merely by authorizing them to violate it." Parker v. Brown, 317 U.S. 341, 351 (1943).

Rather,

> This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight."

Southern Motor Carriers, supra, fn. 23.

The application of these principles to the case at bar shows that the regulatory statutes at issue do not form the basis as a matter of law at the pleadings stage for the immunization of purely private, voluntary conduct. Far from being the clear articulation and affirmative expreession of state policy that the Court has required, the Indiana laws supposedly offering the cloak of state protection in this case are statutes of general application that in no way conflict with the preeminent

federal policy favoring free competition.

States pass both peer review and licensing laws to assure competent, ethical performance of essential health care services.[5] Absent an affirmative expression of state policy, there is no reason to assume that a peer review statute is meant to be used as a means to exclude competent, but "undesirable" physicians[6] from a hospital medical

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5 This Court has discarded the argument that competition is inconsistent with the nature of the licensed professions. National Society of Professional Engineers v. U.S., 435 U.S. 679 (1976). Similarly, the Court has found competition and the antitrust law to be consistent with both federal and state policies aimed at assuring high quality, low cost health care services, Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1981). Thus, there is no basis for holding that physicians or hospitals should be subject to a broader grant of state action immunity than other businesses.

6 E.g., doctors who offer "undesirable" competition to

staff. Thus, it was incorrect for the court of appeals below to decide that Indiana has clearly articulated through its peer review law a state policy to "displace competition" as required by this Court's decisions.

B. "Active State Supervision" -- Which Consists of a "Pointed Re-examination" of Private Conduct -- Is Also Required for State Action Immunity to Attach

Further, the mere existence of a licensing board which "may" consider peer review materials but has absolutely no authority to review private hospitals' individual staffing decisions does not at all constitute the "pointed re-examination" of private conduct required for a finding of "active state supervision." In Midcal, the Court rejected a claim of immunity which had

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physicians who control or influence the peer review process.

been based on a state wine "price posting" law. The Court found that

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105-106 (1980) (footnote ommitted). Cf. Cantor v. Detroit Edison, 428 U.S. 579 (1976) ("no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff", Cantor as interpreted in Midcal, 445 U.S. at 104) with New Motor Vehicle Board v. Orrin Fox, 439 U.S. 96 (1978) (immunity found where state board held thorough hearings to

review private conduct undertaken pursuant to a clearly articulated state policy).

In its recent Southern Motor Carriers decision, the Court reemphasized the importance of this prong of the Midcal test. A state must "demonstrate[] its commitment to a program through its exercise of regulatory oversight" for state action immunity to apply. Southern Motor Carriers, supra, slip op. at fn. 23.

Only the most strained interpretation of the hospital and physician licensing statutes at issue in the instant case can find "active state supervision" of private peer review conduct. Assuming for the sake of argument that the peer review statute did evidence a "clearly articulated" and "affirmatively expressed" policy to

displace competition among physicians with state regulation, there is no "commitment to a program" demonstrated by an "exercise of regulatory oversight." Indeed, the physicians and hospital licensing boards which the court of appeals held to have provided the requisite state supervision are not even authorized, let alone required, to review private hospitals' medical staffing decisions. A finding of state action based on this evidence of active state supervision would approve just the type of "gauzy cloak of state involvement" which the Court has held insufficient.

III. THE APPLICATION OF THE STATE ACTION DOCTRINE TO PRIVATE PARTIES NECESSARILY REQUIRES AT LEAST A CURSORY EXAMINATION OF THE FACTS ALLEGED IN THE COMPLAINT TO DETERMINE WHETHER THE ALLEGED CONDUCT FALLS WITHIN THE SCOPE OF A STATUTE WHICH PURPORTEDLY ESTABLISHES ANTITRUST IMMUNITY.

One of the gravest dangers of the court of appeals decision in this case is its refusal to allow even a limited examination by the trial court of the facts alleged by the plaintiff to be in violation of the antitrust laws. This result threatens to create a broad protective umbrella which could shield even the most blatant and anticompetitive conspiracies performed under the guise of hospital governance.

As amici states, we have no view on the merits of Dr. Marrese's complaint, and it is not necessary that the Court form a judgment on this question either. However, for the purpose of reviewing the affirmance of the granting of a motion to

dismiss, we must assume the facts alleged in the complaint are true. Dr. Marrese alleges a conspiracy by a group of competing physicians to abuse, in bad faith, positions of influence in the only hospital in Evansville, Indiana by recommending the revocation of Dr. Marrese's hospital privileges in order to eliminate him as a competitor. Numerous antitrust suits have been filed in recent years alleging similar conspiracies without a single successful claim of state action immunity. See, e.g., Robinson v. Magovern, 521 F.Supp. 842 (W.D. Pa. 1981), aff'd, 688 F.2d 824 (3d Cir. 1982); Smith v. Northern Michigan Hospitals, 703 F.2d 942 (6th Cir. 1983); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346 (7th Cir. 1982). This Court has made clear that unreasonably

anticompetitive conduct in a hospital setting would violate the antitrust laws. Cf. Jefferson Parish Hospital Dist. v. Hyde, 434 U.S. 1011 (1984) (exclusive contract between hospital and group of anesthesiologists might be unlawful if sufficient market power shown).

Never before has this Court allowed the dismissal under the state action doctrine of an antitrust complaint charging such a conspiracy among purely private parties. Indeed, all of the cases cited by the court of appeals in support of its proposition that such an early dismissal is warranted are decisions involving actions by the state itself, by a state agency, or by private parties alleged to be in combination with state officials. See, Hoover v. Ronwin, _____ U.S. _____, 104 S.Ct. 1989 (1984)

(bar examination rules exempt as actions of the state supreme court); Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), cert. denied, 103 S.Ct. 1198 (1983) (conduct compelled by state law undertaken by private dentists allegedly acting in concert with state officials exempt on summary judgment); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982) (regulation of nonresident dentists exempt as action of state board).

This distinction is crucial, as this Court recently recognized in allowing the dismissal at the pleadings stage of a complaint charging a state committee of bar examiners -- itself an arm of the state supreme court -- with antitrust violations:

> Closer analysis is required when the activity at issue is

> not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization . . . In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State.

Hoover, supra, at 1995 (footnote and citations omitted). Cf. Southern Motor Carriers Rate Conference, Inc. v. U.S., ___ U.S. ____ (March 27, 1985) (conduct of private parties held exempt on summary judgment on a stipulated factual record.)

With the exception of the court of appeals in the instant case, the lower courts have not had trouble understanding this principle. In several health care cases, courts of appeals have reversed precipitous dismissals in order to require the district court to examine the factual basis for the claim of state action immunity. E.g., Virginia Academy

of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980) cert. denied, 450 U.S. 916 (1981); Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 550 (5th Cir. 1978) cert. denied, 444 U.S. 924 (1980). The need to examine the underlying evidence is especially important in a case like the one before the Court, where the complaint alleges a conspiracy involving "bad faith" conduct outside the scope of the duties of a private party acting in a quasi-official capacity.[7]

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7 This analysis may well reveal no disputed issues of fact, in which case summary judgment would, of course, be appropriate. Southern Motor Carriers, supra; Orrin W. Fox Co. v. New Motor Veh. Bd., 440 F.Supp. 436 (C.D. Cal. 1977), aff'd sub nom. New Motor Veh. Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). The amici states intimate no view on whether summary judgment would be appropriate in the instant case.

The court of appeals' refusal even to address the fact that the plaintiff's complaint alleged conduct outside the protection of even a broad reading of the state statutes in question reveals just how far the decision reaches. Dr. Marrese expressly alleged that the conspiracy was in bad faith and thus not protected by a general civil damages immunity provision of state law. Amended Complaint para. 49. While Dr. Marrese may ultimately be unsuccessful in proving his allegations, the district court must at least determine whether an issue of fact exists before assuming that the conduct is protected by the state action doctrine. Thus, the court of appeals decision prohibits Dr. Marrese's suit even if the alleged conduct was done solely for anticompetitive reasons outside of any alleged expression of

state policy.[8] This result is contrary to this Court's decisions and is unprecedented even among lower court decisions.

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8 It is significant to note that the district court dismissed the complaint for lack of an effect on interstate commerce, a ground rejected by the court of appeals. The district court did not itself address the question of state action. Thus, the parties had no opoortunity at all to present evidence on these crucial questions.

CONCLUSION

For the reasons discussed herein, the Court should grant the plaintiff's Petition for Writ of Certiorari.

Dated: April 5, 1985.

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